In Supreme Court,

October Term, 1900.

NO. 378.

MORTIMER WEBSTER, PLAINTIFF IN ERROR,

VS.

THE CITY OF FARGO, JAMES M. ROWE, AS AUDITOR OF THE CITY OF FARGO; D. C. ROSS, AS COUNTY TREASURER OF CASS COUNTY, AND O. J. OLSON, AS COUNTY AUDITOR OF CASS COUNTY.

BRIEF OF PLAINTIFF IN ERROR.

IN ERROR TO THE SUPREME COURT OF NORTH DAKOTA.

STATEMENT OF THE CASE.

This cause comes to this court by writ of error to the Supreme Court of the State of North Dakota.

It was brought in the district court of that state, to enjoin the sale of the premises described in the complaint, belonging to plaintiff in error, for the collection of an alleged delinquent special assessment levied

on said premises by the defendant, The City of Fargo, for paving the street upon which the premises abutted, and to declare the assessment void, and cancel the same as a cloud upon the plaintiff's title.

The complaint alleges specifically the due and proper performance of every act by the officers of the city, required by them to be done, essential to the regularity of such assessment, and no question is raised as to such regularity, or as to the validity of the assessment, except, that the statute under which it was levied and the proceedings taken under it are in violation of the Fourteenth Amendment of the Constitution of the United States. (Complaint, pages 4 to 9 transcript).

The defendant demurred to the complaint, on the ground that it "does not state facts sufficient to constitute a cause of action against thedefendants or either of them." (Page 9 transcript).

The only question raised, argued or passed upon, on this demurrer, was the validity of the statute under the Fourteenth Amendment. (Pages 9 and 10 transcript).

The District Court sustained the demurrer, and directed judgment against the plaintiff, (this plaintiff in error), dismissing his complaint on the merits, which judgment was thereupon entered. (Pages 10 and 11 transcript).

From this judgment the plaintiff, (this plaintiff in error), appealed to the Supreme Court of the State of North Dakota. (Page 10 transcript).

The Supreme Court of the state thereupon, (following its former decision in Rolph vs. The City of Fargo, 7th North Dakota 640), gave its judgment affirming the judgment of the District Court. (Pages 13 to 19 transcript).

The plaintiff thereupon sued out a writ of error, and brought the case here.

The Statutes of North Dakota under which the proceedings for this assessment were had are contained in the Revised Codes of said State, and in the laws of 1897 and are as follows, to-wit:

Revised Codes:

Section 2279. Resolution declaring work necessary.

When the city council shall deem it necessary to open, widen extend, wrade, pave, macadamize, bridge curb, gutter, drain, or otherwise improve any street, alley, avenue, lane or highway, or other public grounds within the city limits or extend or improve any public system of water-works exclusively owned and operated by the city for which a special assessment is to be levied, as herein provided, the city council shall, by resolution, declare such work or improvement ne-

cessary to be done, and such resolution shall be published for four consecutive weeks, at least once a week in the official newspaper of the city, and if a majority of the owners of the property liable to be assessed therefor, shall not within twenty days after the expiration of such publication file with the city auditor a written protest against such improvement, then the city council shall have power to cause such improvement to be made, and to contract therefor, and to levy and collect the assessment as hereinafter provided, and all work done under this section shall be let by contract to the lowest responsible bidder therefor.

Section 2280. Assessments for improvements how made.

Whenever any work or improvement mentioned in the proceding section shall have been determined upon and the contract let therefor, the city engineer shall forthwith calculate the amount to be assessed for such improvement for each lot or parcel of ground abutting or bounding upon such improvement. And in estimating the assessment he shall take the entire cost of such improvement and divide the same by the number of feet fronting or abutting upon the same, and the quotient shall be the sum to be assessed per front foot so bounding or abutting, and said estimate shall be filed with the city auditor and shall be presented to

the city council for its approval at the first meeting held thereafter. The city auditor shall cause said estimate of the city engineer, together with a notice of the time and place when the council will meet to approve of the same, to be published in the official newspaper of the city for at least ten days prior to the meeting of the city council to approve the same.

Section 2286. Publication of assessment roll.

After the assessment above provided for shall have been made and approved by the city council, the city clerk or auditor shall forthwith make an assessment roll describing the property so assessed, with the name of the owner if known, and the amount assessed to each lot or parcel of land as approved by the city council and attach thereto a copy of the resolution of the city council approving the same, and certify that the same is correct, and shall file the same with the city treasurer for collection. The city treasurer shall forthwith publish said list three successive weeks, at least once in each week, in a newspaper published in said city, together with a notice that said assessments will become delinquent if the same are not paid within thirty days after the date of the first publication, together with a notice that a penalty of ten per cent will be added thereto after they become delinquent.

Section 2288. Assessments, how paid. Penalty for non-payment.

After the estimate provided in section 2287 shall have been so approved, the auditor shall forthwith make or cause to be made an assessment roll describing the property so assessed, with the name of the owner, if known, and the amount assessed to each lot, piece or parcel of ground as approved by the city council, and attach thereto a copy of the resolution of the city council approving the same, and certify that the same is correct, and shall file the same with the city treasurer for collection. The city treasurer shall publish said list three successive weeks at least once in each week in the official newspaper of the city, together with a notice that a penalty of ten per cent will be added thereto if the same is not paid within thirty days after the date of the first publication, stating the time when such penalty shall accrue.

Section 2294 as amended by chapter 102 laws of 1897.

* * * * * The county treasurer shall collect and enforce the collection of all special assessments, together with the penalty and interest thereon, if any, in the same manner as other taxes, and shall pay over to the city treasurer, on demand, on the first of each month, all sums so collected during the pre-

ceding month and any balance that may be due on the collections of previous months, retaining one per cent thereof as his commission for collecting the same, and shall forthwith notify the city auditor of the amount so paid over, giving a description of the real property upon which the same is paid and the amount of special assessments paid thereon. The filing of a special assessment roll with the county treasurer by the city auditor shall be full and sufficient authority for the collection by the county treasurer of all special assessments therein contained. As soon as any special assessments become delinquent the county treasurer shall deliver to the county auditor the assessment roll containing such special assessments, and the county auditor shall thereupon extend the same upon the tax roll of the county in the same manner as taxes are extended, and the collection of the same shall be enforced in the same manner and by the same remedies as the collection of delinquent taxes is enforced.

Setions 74 and 76 of Chapter 126 of the laws of 1897, in force at time of sale for delinquent taxes at which the lands involved in this suit could have been sold, provided for the sale of lands for delinquent taxes and are as follows, to-wit:

Section 74. Auditor's Notice of Sale.

The county auditor, under the direction of the

board of county commissioners, or a majority thereof, shall give notice of the sale of real property by the publication thereof, once a week for three consecutive weeks, the first of which publications shall be made not less than nineteen days before the day of the sale, in such newspaper as may be designated by the county commissioners for that purpose in the county, if there be one, and if there be no paper published in his county, he shall give notice by a written or printed notice posted on the door of the courthouse or building in which courts are commonly held, or the usual place of meeting of the county commissioners, for three weeks previous to the sale. In counties having daily papers the delinquent tax list shall be published in one issue of the daily edition and in two issues of the weekly edition of the same paper, so selected by the board of county commissioners. Such notice shall contain a notice that all lands on which the taxes of the preceding year (mentioning it) remain unpaid will be sold and the time and place of sale, which time shall be the first Tuesday in the December following, and said notice must contain a list of the lands to be sold and the amount of taxes and penalty due, to which amount the auditor shall add to each description of land so advertised the sum of twenty (20) cents, and for each description of town lots, the sum of ten (10) cents, to de-

fray the expenses of advertising, and the cost of such advertising shall be paid by the county commissioners at the expiration of the sale upon the affidavit of the publisher; provided, that in no case shall the property so advertised be charged for such advertising an amount exceeding the sum actually paid for the same.

Section 76. Auditor to sell at Public Vendue.

Said sale shall be made at public auction at the office of the county auditor or usual place of holding court in the same building, and shall commence at the hour of ten in the forenoon, but may be adjourned from day to day for a period of ten days whenever it is necessary for the disposal of the lands advertised. The lands and lots shall be offered for sale by the county auditor or his deputy in the order in which they appear on the advertised list, and each tract or lot shall be offered separately and struck off to the bidder who will pay the total amount of taxes, penalties and costs charged against it, including any personal taxes specified in the list and in the advertisement, which are a lien upon it, for the smallest or least quantity thereof, which may be designated by any sufficient description. But if the sum bid for the same is not paid before the sales closes, such tract or lot shall again be offered for sale in like manner. The county treasurer shall attend the sale and receive all moneys paid there-

on, and when any tract of land or lot remains unsold for want of bidders the same shall again be offered before the sale closes, and if there is no other bidder he shall bid for the same in the name of th county, and th same shall be struck off and become forfeited to the county. Such tract or lot shall be assessed and taxed like others until the period for redemption expires, but shall not be again offered for sale for such subsequent taxes unless the county has made an assignment of the certificate of sale. And if not so assigned such forfeiture shall become absolute at the expiration of such period for redemption.

The constitution of the State of North Dakota, Section 69, provides: "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * * * *

Sub-division 33. The incorporation of cities, towns or villages, or changing or amending the charter of any town, city or village.

Section 70. In all other cases where the general law can be made applicable, no sepcial law shall be be enacted, nor shall the legislative assembly indirectly enact such special or local law by the partial repeal of a general law.

Section 25.

The legislative power shall be vested in a senate and house of representatives.

Section 130.

The legislative assembly shall provide by general law for the organization of municipal corporations, restricting their powers as to levying taxes *and assessments*, borrowing money and contracting debts, and money raised by taxation, loan or *assessment* for any purpose shall not be diverted to any other purpose except by authority of law.

ASSIGNMENT OR ERRORS.

Afterward, to-wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, in the city of Washington, comes the said Mortimer Webster, plaintiff in error, by Seth Newman, his attorney, and says that, in the record and proceedings aforesaid, there is manifest error in this, to-wit:

That the complaint in said action and the matters therein contained are sufficient in law for the said Mortimer Webster to have or maintain his action aforesaid against the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, defendants in error, be-

cause the acts and proceedings set forth in his said complaint as constituting a special assessment against his property, as therein set forth, and the statutes of the State of North Dakota under which said acts and proceedings were had and taken, are in violation of the fourteenth amendment of the Constitution of the United States; and said special assessment constitutes a cloud upon the title of the property of the said Mortimer Webster, and the threatened sale thereof would create irreparabl injury to him.

There is also error in this, to-wit, that by the record aforesaid it appears, that the judgment aforesaid given, was given for the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, defendants in error, against the said Mortimer Webster, whereas by the law of the land the judgment ought to have been given for the said Mortimer Webster, against the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, and the said Mortimer Webster prays the judgment aforesaid may be reversed, annulled, and held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment.

ARGUMENT.

The Statute, Section 2280 Revised Codes of North Dakota, and the proceedings taken under it for the assessment of the real property of plaintiff in error, are in violation of the fourteenth amendment of the Constitution of the United States, because the enforcement of the statute, and sale of the property of the plaintiff in error by virtue of the assessment levied under it, will deprive him of his proprty without due process of law, and will deny him the equal protection of the law.

It will do this:

1. Because it imposes upon particular private property, the *entire cost* of a local public improvement, irrspective of the pecuniary and exceptional benefits accruing to it from such improvement.

2. Because it proceeds by a rule or system which absolutely and entirely precludes the consideration of special benefits.

3. Because the apportionment of the assessment, by the legislature is the assumption and exercise of judicial power.

4. Because the state legislature assumes to declare by a general law, that under all circumstances and conditions, in all cities or parts of cities, present or prospective, the benefits accruing to private proper-

ty abutting on improvements, contemplated by section 2279, will equal or exceed the entire cost of such improvement, and will be, as to each particular parcel of such property, exactly in proportion to its frontage. A judicial function and determination, proceeding without investigation or evidence, and dependent solely upon the fiat of a legislative body.

5. Because the statute does not give the property owner affected by the assessment any "right to show that the sum assessed against his property is in excess of the benefits received" or any opportunity to be heard as to the justice of the assessment.

6. Because the statute and the proceedings taken under it are arbitrary, oppressive and unjust.

General Taxation:

But two methods for the taxation of real property are recognized in this country: First, general taxation. Second, special assessments.

Both must be for a public purpose and based on public necessity or requirements, that of general taxation on the necessity for protection to the life, liberty and property of the citizen, and promotion of his welfare. And the benefits accruing from general taxation affect all citizens alike within the district tax and consist in the protection of their life,

liberty and property and of the right to pursue the usual avocations of life, and to acquire and enjoy unmolested the fruits of their exertions; in short to enjoy all the blessings of a good and stable government. These benefits are of undeterminable value, personal in their nature and incapable of pecuniary estimate. As these benefits affect the citizen most largely in the acquisition, possession and enjoyment of property, it seems just that the burden general of taxation should be borne by all property alike according to its value.

Local Taxation:

Local taxation is general taxation for certain limited local purposes, conferred on and exercised by local communities exercising governmental functions within certain limitations, for such purposes, and within defined districts, and enjoying as to those functions certain privileges of self government not possessed by all communities throughout the state. The benefits of such taxation are general in their nature within the local community, and are indeterminable and incapable of exact pecuniary estimation, and affect all members of such community uniformly.

Special Assessment:

Special assessments are assessments levied upon particular property for making a specific local improvement, which property will be affected by such

proposed improvement, and will derive from such improvement exceptional benefits in the enhancement of its value and are laid upon the basis of and solely with reference and in proportion to such exceptional benefits.

The benefit of a street improvement is twofold:

1. A general benefit to all members of the local community, in the increase of the ease, comfort and facility it affords them in the use of the street; the improvement of the sanitary conditions of the neighborhood, etc. This benefit is the same as that for which general and local taxes are levied. It is general in its nature, incapable of pecuniary estimate, and reaches all members of the local community alike. It is limited only by the necessity for the improvement.

2. A special, pecuniary and exceptional benefit to those members of the local community who own real property abutting on the improvement, or in near proximity, in the enhancement of the value of such property; a benefit the amount of which is easily ascertainable by the usual method of ascertaining values of property, that is, by the evidence, expert in its nature, of men familiar with the subject and competent to testify, or by any other equivalent method. Assessments laid for such improvement without reference to such benefits are general taxation. Special assessments can only be justified when levied in *accordance with*

such benefits and *not in substantial excess thereof. No other basis is known to the law on which they can rest.*

The general benefits of a local improvement being limited only by its necessity; it may be made by general taxation, and the determination of whether or not it shall be so done, is purely legislative.

The construction of such local improvements, by general or local taxation, will however, necessarily result in *enriching* those individuals who own real property abutting on the improvements, to the extent that it actually increases the value of such property, and this at the expense of the general tax-payer, thus impoverishing the general tax-payer ostensibly for a public purpose, but with the direct and necessary result of adding to the value of private property a clearly ascertainable amount.

This is fundamentally unjust.

Justice requires alike that no individual shall be enriched at the public expense or impoverished for the public benefit beyond any other member of the general public affected by the tax, or any other particular individual affected by the improvement.

Upon this theory and under this beneficent doctrine has originated the power and system of special assessment for local improvements; the power to compel each parcel of property, directly enhanced in value

in a definite and ascertainable amount, by a given local improvement, to contribute a portion or all of such amount to defray the expense of making the improvement, which has resulted in such benefit.

If such contributions to the extent of the increased value of the property benefited, are insufficient to defray such expense, the necessity for the improvement furnishes a just reason, for payment of the balance by local txation bearing alike on the whole local community.

The power of determining whether the expense of the improvement shall be defrayed by general taxation, or special assessment, is purely legislative.

If by general taxation, it must proceed upon the well known and well defined principles governing that subject, and not by methods resulting in confiscation.

If by special assessment, it must be based on the just principles underlying such assessment, or it becomes confiscation.

The doctrine that special assessments for local improvements are based upon exceptional benefits, resulting to property in the vicinity, by the construction of such improvements, and must be laid with reference to such benefits, has become the firmly established and universally conceded law of the land, except in North Dakota.

Peo. v Mayor, 4 N. Y. 425.

Chicago v Larned, 34 Ill. 203.

Dexter v. Boston, 57 N. E. Rep. 379, (Mass.)

Hascombe v. Omaha, 7 N. W. Rep. 739 (Neb).

State v. Patterson, 5 At. Rep, 896, (N. J.)

Report of Commissioners, 10 At. Rep. 363 (N.J.)

Gilmore v. Heutig, 5 Pac. Rep. 781, (Kan.)

Denver v. Knowles, 17 L. R. A. 142, (Col.)

Creighton v. Manson, 27 Cal. 621.

Taylor v. Palmer, 31 Cal. 254.

Tide Water Co. v. Costen, 90 Am. Dec. 641 (N.J.)

Nichols v. Bridgeport, 23 Conn. 189.

Chamberlain v. Cleveland, 34 Ohio St. 551.

State v. District Court, 29 Minn. 62.

State v. Seymour, 35 N. J. L. 49 .

Dyar v. Farmington, 70 Me. 515.

Barnes v. Dyer, 56 Vt. 466.

State v. Newark, 18 Am. Rep. 729. (N. J.)

Seeley v. Pittsburg, 22 Am. Rep. 760, (Pa.)

Hammett v. Philadelphia, 3 Am. Rep. 615, (Pa.)

Violet v. Alexandria, 23 S. E. Rep. 909, (Va.)

State v. District Court, 33 Minn, 306.

Washington Avenue, 69 Pa. St. 352, 8 Am. Rep. 255.

Thomas v. Gain, 35 Mich. 155.

Peo. v. Lynch, 51 Cal. 15.

State v. Commissioners, 20 Am. Rep. 380.
Johnson v. Milwaukee, 40 Wis. 315.
In re Mead, 74 N. Y. 221.
Petition of Roberts, 81 N. Y. 67.
Neenan v. Smith, 50 Mo. 525.
Crow v. Tolans, 96 Ill. 255.
Wolf v. Philadelphia, 105 Pa. St. 25.
Raleigh v. Peace, 14 S. E. Rep. 525, (N. C.)

All courts, except in North Dakota, concede and maintain the doctrine, but differ as to the source of the power to make the determination of the benefits and the apportionment of the assessments.

Rule in North Dakota:

The Supreme Court of North Dakota in its decisions in Rolfe v. The City of Fargo, 7th N. D. 640, and in the case at bar, 82 N. W. Rep. 732, has made the widest departure yet made from this rule.

Its decisions were upon the statute involved in this case and were the logical and inevitable conclusions necessary to uphold the statute.

Character of the Statute:

The court was confronted with a statute which imposed a uniform assessment for the *entire cost* of local

improvements upon the real property abutting on such improvement *according to frontage*, to be determined by a fixed arbitrary and invariable rule of mathematical calculation, into which no element of the exercise of judgment entered; in cities present and prospective, under all conditions, in all circumstances and at all times; a statute which as effectually precluded the consideration of benefits as though it had positively in terms prohibited such consideraton, and refused the property owner a substantial hearing on the justice of the assessment.

The court found, if it based the right of special assessments upon the doctrine stated, it must concede to the legislature attributes in the nature of omniscience and omnipotence and that it was therefore necessary either to abandon the establishd basis upon which such assessments have always been held to rest, or destroy the act of the legislature.

Without hesitation therefore the court proceeded to place the power to levy special assessments upon the same basis as the power of general taxation, that of theoretical, hypothetical and indeterminable benefits common to all within the improvement district alike; pertaining rather to the person than to his property, and, ignoring entirely the pecuniary advantages or exceptional benefit to individual property necessarily aris-

ing from the improvement, it assimilated special assessments to local taxation, with this difference, however, that whereas general and local taxation are limited in method by the State Constitution, and must proceed according to valuation of property, special assessments, while proceeding upon the same principles as general taxation, are exempt from the limitations of the Constitution, and the exaction may be made in any manner the unlimited power of the legislature shall dictate, and without interference by the courts. While eliminating the principle underlying special assessments it retained the form, name and methods.

Opinion of the N. D. Court:

The Court says: 7th N. D. page 647.

"When the tax-payer is called upon to contribute for general purposes, he is not permitted to challenge the legality of the tax on the ground that he has not received a pecuniary benefit commensurate with the sum he is required to pay. Whence comes the right of the courts to accord to him this peculiar privilege in cases of local assessment? It is right here that the fallacy of the cases which support the view of counsel for plaintiff lies. They differentiate, but on what principle it is impossible to discover, local assessments from general taxes. They admit that the question of benefits is only one of general theory when taxes are being apportioned

for ordinary purposes. But straightaway a new doctrine comes in play when the very same taxing power is exercised for an object which is as much public as the expenses of the administration of government. This doctrine has no foundation in reason, and it would never have been enunciated had it not been that it was more easy to discover particular hardships in cases involving local assessments, and had not the courts fancied that unless they intervened the property of the citizen was doomed to confiscation from the abuse of this power. What is it that distinguishes a local assessment from a general tax? Their points of resemblance are numerous. Each is an exercise of the taxing power, pure and simple. The burden is spread over a taxing district, and is apportioned according to some rule. The purpose for which the tax is levied is public.

The general theory on which rests, in each case, the imposition of the particular burden upon the particular taxing district, is the benefit derived by the taxpayers therein from the application of the moneys so raised to the public purpose for which the tax is levied. It is because the law assumes a *general benefit to the people of a particular district* that it permits the tax to be levied upon that district. It is *not* because each tax-payer is supposed *to receive an exact money equivalent that he is requested to pay*. But, because the

tax is one which pertains to that district, it therefore is levied thereon, to be apportioned in such manner as the constitution points out, if it speaks at all on the subject, or as the legislature directs, in case the fundamental law is silent. So, when a local assessment is levied, the question *is not how much, in dollars and cents, each parcel of land has been enhanced in value* by the local improvement, *but what is the particular district which is, in a general sense, peculiarly benefited* by the improvement; and, when this is once ascertained, then there remains only the question of the apportionment of the tax to be made in accordance with the constitution, if it regulates the matter, or as the legislature shall direct, when its discretion has not been limited by the organic law. The only marked point of difference between a tax and a local assessment is that the former is spread over a permanent taxing district, while the latter is to be collected from a special and temporary taxing district, created for that single purpose, because the benefit of the public improvement is so peculiarly local that to require all the tax-payers of the general taxing district to pay for it would be palpably unjust. *The same general principles govern an exercise of the power of levying local assessments as apply to the exercise of the taxing power for general purposes.* * * * *

What is it that so differentiates the power of local

assessment from the power of general taxation that in one case the sovereign must give back in value all that is taken, while in the other it can, if necessary (unless there be constitutional checks), take from the citizen all his property, without reference to his receiving in return any commensurate advantages or any benefit at all? Until this question is answered in favor of such a distinction, *it is idle to talk of the enhanced value of the land assessed as the limit of the power of local assessment.* When such an assessment is levied upon property for a particular improvement, a tax is as much collected as when the expense of the work is charged to the general tax levy. *The only distinction is that the district is narrower, and the mode of apportionment different.* Usually, too only real property is considered in making the apportionment, and not all property, real and personal. *In all other respects the two classes of cases are identical. The same power of taxation is exercised in each instance,* and except with respect to constitution restrictions or inherent limitations, *the legislative discretion is, in both classes of cases absolute.* We have already referred to those limtiations which inhere in the very nature of the taxing power. None of them affect the question before us. The assessment is for a public purpose. It pertains to the district within which it is to be collected, and it is appor-

tioned according to a uniform rule. When we turn to the constitution for light, we find there no provision which relates to local assessments except the one which directs the legislature to restrict the power to make such assessments when exercised by municipal corporations.

The North Dakota court has thus completely abolished the distinction in principle between general taxation and special assessment based on exceptional benefit for local improvement. It places them on the same general basis, declares that they are governed by the same character of general underterminable benefits.

It says: "The only distinction is that the district is narrower."

If so if it possesses no other element to differentiate it from general taxation, then it is governed by the same constitutional provision as other general or local taxation and must proceed under the restrictions and limitations of the state constitution.

It must be uniform and based upon the valuation of property. If the view of the North Dakota court is to be sustained then the statute deprives plaintiff in error of the equal protection of the laws in that it requires his property to be taxed by a rule different from that prescribed by the constitution of the state for the general taxation of property; a rule not proceeding with

any uniformity or upon valuation, but arbitrary, oppressive and unjust. The mere fact of the difference in the size in the taxing district does not provide a reason or basis for classification as to method of imposing a tax.

Gulf Railway v. Ellis, 165 U. S., 150.

R. R. Tax Cases, 13 Fed. Rep. 722.

Telephone Cases v. Board of Equalization, 85 Fed. Rep. 303.

Nashville R. Co. v. Taylor, 86 Fed. Dep. 169.

Judicial nature of power.

The North Dakota court, and other courts which have sustained front foot assessments, especially under general statutes, notably California and Missouri, (Hadley v. Dague 62 Pac. Rep. 501 (Cal.); Heman v. Allen 57 S. W. Rep. 559 (Mo)) have been compelled to do so upon the ground that the apportionment of the assessment, that is the determination of the exact amount that a given piece of property shall pay, *is an exclusively legislative prerogative.* We concede that the determination of the necessity, propriety and expediency of the improvemnt is a purely legislative prerogative.

If the basis of such assessments is the same as that of general taxation, if they do not rest on exceptional benefits in the definite enhancement of value of the property assessed, but on general undeterminable benefits, then the determination of the limits of the district benefited, and *in which all property must be taxed*, is a purely legislative function.

If, however, such assessments do rest, and can only be justified, upon the doctrine of such exceptional benefits, and the determination of the area of the benefited district *includes* the determination that all property within that district *must* be assessed, then such determination, and also the determination of the amount of each individual assessment requires the determination of the values of property, and this renders the powers exercised in such determination, purely judicial; and such powers must be committed to judicial or quasi-judicial tribunals created by the legislature and clothed with power to make the determination.

The legislature may create courts and provide their powers, but it cannot resolve itself into a court; its powers are purely legislative.

Constitution of North Dakota, Sec. 25.

It cannot hear and determine controversies relating to private property rights; such an assumed power would be usurpation and not due process of law.

Under the doctrine of special assessments for which we contend, the question of whether each particular piece of property within the taxing district is exceptionally benefitted,and the amount of such exceptional benefit, require inquiry into the values of property, and the amount of the increase of such value by the improvement. The basis of the determination of the amount of the exceptional benefit is the difference between the value of the property without the improvement and with it.

People v. Mayor 63 N. Y. 299.

Cooley on Taxation (1 Ed.) 459. 2 Ed. 660.

This requires a determination of values not different from that required for the valuation of property for purposes of general taxation.

In one case the citizen is to be deprived of his property for the public benefit by a process based on the total valuation of his property; in the other on the basis of the increased valuation of that portion of his property benefited by the improvement. In either case the investigation must proceed on evidence expert in its nature, the opinions of men familiar with the subject, and it would be a strange anomaly and injustice in

the law if the citizen, who must part with his property upon this determination, was not permitted to rebut the evidence against him, or could not be heard as to the justice of the exaction.

Such investigation and determination are purely judicial in their nature and cannot be assumed or made by the legislature.

Monongahela Co. v. U. S. 148, U. S. 327.

It is elementary that the citizen has no constitutional right to be heard with reference to the justice of any act purely legislative in its character.

It is equally elementary that every citizen has a constitutional right to be heard in *any judicial or quasi judicial proceeding by which he is to be deprived of his property.*

This Court has frequently held that in assessments of this character, when provision was made in the law giving the property owner whose property was assessed *an opportunity to be heard as to the justice of the assessment* before a tribunal *clothed with the power of correcting such assessment in accordance with justice* he was not deprived of his property without due process of law

Davidson v. New Orleans, 96 U. S. 97, L. Ed. 24-616.

Walston v Nevin, 128 U. S. 578, L Ed. 32-540.

Paulson v. Portland, 149 U. S. 30, L. Ed. 37, 627.

Hagar v. Reclamation Dist. 111 U. S. 701, L. Ed. 28. 569.

Spencer v. Merchant, 125 U. S. 345, L. Ed. 31. 763.

Palmer V. McMahon, 133 U. S. 660, L. Ed. 33. 772.

Irrigation District v. Bradley, 164 U. S. 112, L. Ed ●. 41. 369.

Conversely, in such a case, if he is not by the law furnished with such opportunity, he is deprived of his property without due process of law.

Judge Dillon says: "Whenever the principle is adopted that assessments for local improvements can be justified only to the extent of special benefits actually received and must be apportioned according to benefits, * * * * * * the question of the existence and extent of benefits becomes in its nature judicial."

Dillon Municipal Corporations, 4th Ed.

Judge Cooley in speaking of assessing officers says:

"That the duty of these officers calls into action the judicial function is unquestionable."

Cooley on Taxation, 2d Ed. 788.

In Reagan v. Trust Co., 154 U. S. 399, this court says:

"It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property; in every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another or of the public."

In Palmer v. McMahon, 133 U. S. 660, it says:

"Assessors exercise quasi-judicial powers in arriving at the value and opportunity to be heard should be and is given under all just systems of taxation according to value."

The courts of Pennsylvania, Rhode Island and Minnesota deny the legislative power to impose front foot assessments except in densely populated districts; a recognition that the power is not a legislative prerogative.

Seeley v. Pittsburg, 82 Pa. St. 360.

Sperry v. Flygare, 83 N. W. Rep. 177. Minn.

Cleveland v. Tripp, 13 R. I. 61.

See also Newby v. Platt, 25 Mo. 272.

Sedgewick on Constitutional Law, 169, 174-175 and 177.

Norfolk v. Ellis, 26 Grattan, 242. (Va.)

Under the authorities we conclude the law to be that the legislature may determine the necessity, propriety and expediency of the improvement and the district within which the assessment shall be levied, and that this is a purely legislative function. That the determination of the particular pieces of property within the district which are benefitted, and the amount to

which each is benefitted, and which it *must* pay as an assessment for making the improvement is a judicial inquiry and determination.

It is conceded that numerous cases have sustained the power of the legislature *by special legislation* to direct a levy for the cost of local improvements by front foot assessments *without abandoning the principle of exceptional benefits* and this *upon the theory that the legislature was competent to determine the fact that the cost did not exceed the benefits and that all property* taxed was *equally benefitted in proportion to its frontage.*

This conclusion, however, has usually been announced by naked asseveration of such power rather than by a statement of the reasons for its existence, and it is difficult to understand upon what basis of reason such decisions rest.

Constitutional limitation of value.

Under the constitutional limitation that all property shall be taxed uniformly according to its value, and in the absence of any provision for, or recognition of special assessments, taxes for local improvements can only be laid on property on a money valuation.

McBean v. Chandler, 9 Heisk 349 (Tenn.)

Stinson v. Smith, 8 Minn. 366.

Bidwell v. Coleman, 11 Minn. 78.

Comrey v. Folsom, 13 Minn. 219.

Under such a constitution, recognizing or authorizing special assessments, they must be levied *on the ground of special benefits received by specific property assessed.* This is the only basis recognized by the authorities for the imposition of such burdens. The fact that it is an "assessment of benefits," *is the only consideration which removes it from the valuation clause* of the constitution. The elimination of that element at once brings the tax within the provisions of the constitution requiring uniformity and valuation.

Violet v. Alexandria, 92 Va. 579.

Morrison v. Morey, 146 Mo. 561.

Constitutional rule.

An assessment of benefits for public improvements can only be imposed in proportion to, and not exceeding the exceptional benefit accruing to the property assessed in enhanced value, by reason of the improvement not common to other property not so assessed, within the limits of the taxing district; an imposition of the en-

tire cost of the improvement by special assessment without regard to benefits is void.

Norwood v. Baker, 172 U. S. 269, L. Ed 41. 443, and the cases and authorities cited in the prevailing opinion.

The imposition of the entire cost of the improvement in a particular district regardless of exceptional benefits can only be made on the ground of general benefits to the community and must under the constitution of North Dakota, be by value.

Review of cases.

The North Dakota court, in its opinion in the case at bar, based its refusal to follow the decision of this court in the case of Norwood v. Baker, Supra, upon the ground as expressed by that court that "we do not believe it was the intention of the Federal Supreme Court to depart from the line of its former decisions."

An examination of the former decisions of this court will show the fallacy of this reason. The cases decided in this court arising in the District of Columbia are not applicable.

The power of taxation by congress in the District of Columbia is without constitutional limitation of any

character, except that it must not deprive the citizen of his property without due process of law.

The method of apportionment is entirely within the discretion of congress. There is no provision guaranteeing equal protection of the laws.

The requirement that taxation shall be for a public purpose,and uniform,arises rather from the underlying principles of justice on which the government rests than from the constitution. The principle of uniformity *in methods of taxation is not even recognized,* and congress may tax by valuation for one purpose, by area for another, by frontage for another and according to benefits for another. Its discretion is plenary.

We search the constitution in vain for any restriction, limitation or regulation of the power other than the general one above stated.

The case of Parsons v. District of Columbia, Supra, is not in point for other reasons.

The assessment was to provide a comprehensive system of water supply for the district; an exercise of purely police power for the protection of the public health and the protection of property from destruction by fire and promote the public convenience. It was in no sense a special assessment for street improvement, and the benefits to result from the system of water supply were general and personal in their nature

rather than exceptional to the property asssed; and the method of assessment was one of the methods of general taxation to which congress might resort whenever in its judgment such a course was advisable.

Would not the imposition of a general tax for all municipal purposes according to area be within the limitations of the Federal Constitution? Does that instrument prohibit congress taxing horses and cattle per capita, or carriages and all other personal property by the article? And is not the decision of congress upon the methods and rule of apportionment of all taxes within all territory under its exclusive jurisdiction final as an exercise of purely legislative power? We fail to find any provision in the Federal Constitution which requires a negative answer.

Judge Cooley recognies this doctrine. He says: "If the right to impose a tax exists, it is a right which in its nature acknowledges no limitations. It may be carried to any extent within the jurisdiction of the state or corporation which imposed it, which the law of each state or corporation may prescribe.

Constitutional Limitations 591.

Congress as to municipalities within territories

and the District of Columbia might doubtless give larger powers of taxation than could be conferred by the states.

Cooley on Taxation, 2nd Ed. 344.

In Spencer v. Merchant, Irrigation District v. Bradley, Davidson v. New Orleans, Walston v. Nevin, Paulson v. Portland and Hagar v. Reclamation District, cited by the North Dakota Court, *the question of opportunity to be heard on the justice of the assessment* was the Federal question discussed and decided. It was assumed that the tribunals before whom the hearing was authorized were clothed with the power to do justice in the premises, and adjust the apportionment to that end. *If justice required these assessments to be adjusted according to and not in excess of benefits, they might be so adjusted.*

It is impossible to discover the application of either of these cases to a case where the assessment is apportioned by a rule of final and unchangeable mathematical computation.

In Irrigation Dist. v. Bradley 164 U. S. 112, the question was whether an assessment according to value with a full hearing was valid. It was so held.

The North Dakota Court *concedes* that the statute in question gives *no opportunity for a hearing on the justice of the assessment.*

It says: (7th N. D. page 671).

"The conclusion we have reached as to the legality of the statute, in so far as it requires all the expenses of the improvement to be assessed against the abutting property in proportion to frontage, leads necessarily to the further conclusion that there is no force in the contention of counsel for plaintiff that the tax-payer is not allowed a hearing by the law. *It is true that he is given no hearing on the question of benefits.* But he is furnished with an opportunity *to demonstrate that the assessor* in apportioning the tax according to frontage *has committed an error* by charging up against his land a larger sum than should be assessed against it.

Section 2280, Rev. Codes:

The right to a hearing at some stage in the proceedings is universally recognized where the apportionment of the tax involves the exercise of an act judicial in character; for instance, an assessment according to benefits.

Uhman v. Mayor, etc., (Md.) 20 Atl. Rep. 141, 21 Atl. Rep. 709.

Mayor, etc., v. Uhman, (Md.) 30 Atl. Rep, 43.

Mayor, etc., v. Scharf, 54 Md. 499.

Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921.

Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825.

Violett's Heirs v. City Council of Alexandria (Va.), 23 S. E. Rep. 909.

Dietz v. City of Neenah (Wis.), 64 N. W. Rep. 299.

Spencer v. Merchant, 100 N. Y. 585, 3 N. E. Rep. 682.

Cooley Tax'n, 655

Stuart v. Palmer, 74 N. Y. 183.

But there is authority for the proposition that, when the apportionment of the assessment *involves only a matematical calculation*, the tax-payer is not entitled to be heard.

Cases Following Norwood v. Baker:

The case of Norwood v. Baker has been followed by all federal courts and by most state courts in cases of this character decided since.

Co. of Ramsey v. Robert P. Lewis Co., Minn., Feb. 8, 1901.

State of Minn. v. Pillsbury, Minn., Feb. 8, 1901.

Fay v. Springfield, 94 Fed. Rep. 409.

Loeb v. Trustees, 91 Fed. Rep. 37.

Charles v. City of Marion, 98 Fed. Rep. 166, 100 Fed. Rep. 538.

Lyon v. Town of Tonawonda, 98 Fed. Rep. 361.

Cowley v. City of Spokane, 99 Fed. Rep. 840.

Hutchinson v. Storrie, 92 Tex. 688, 51 S. W. Rep. 848.

Sears v. Street Com. 173 Mass. 350.

Adams v. City (Ind.), 57 N. E. Rep. 114.

McKee v. Town of Pendleton (Ind.) Id. 532.

Dexter v. Boston (Mass.), 57 N. E. Rep. 379.

Parker v. City of Detroit, 103 Fed. Rep. 357.

Bidwell v. Huff, Id. 363.

Those courts which have refused to follow the ruling in the Norwood case, or expressed themselves as dissatisfied with the doctrine, are New York, Michigan California and Missouri in the following cases:

Heeman v. Allen, 57 S. W. Rep. 559 (Mo.)

Conde v. City of Schenectady (N. Y.), 58 N. E.

Rep. 130.

Hadley v. Dague (Cal.), 62 Pac. Rep. 501.

Barber Asphalt Paving Co. v. French, decided Nov. 13, 1900, Mo. Sup. Ct.

We cannot refrain from calling the attention of the court to the opinion in the Ramsey County, Minnesota, case with reference to the decision in the case of Norwood v. Baker: "The cases recited and reviewed show that the court was careful to lay the foundation of its conclusions, that the legislative power in respect to local assessments is not absolute but is confined within certain limits; that it was the intention of the court to lay down a rule of law broad enough to embrace the logic and raesoning of the discussion, seems to us indisputable. It cannot be that the court's conclusions were intended to be limited to a technical construction of the Ohio statutes, as intimated in Webster v. City of Fargo, 82 N. W. 732, and Cass Farm Co. v. City of Detroit, 83 N. W. 108 and in Harman v. Allen, 57 S. W. 559. The principle involved was not necessarily confined to "street opening" cases. The same principle was recognized by the court as applicable to all classes of local improvements, whether in the open-

ing, grading and paving of a street, or in the construction of a sewer, or the laying of a water main. This appears from the scope of the investigation and the nature of the cases reviewed. That the court intended to give voice to a general principle and not to a narrow construction, is furthr evident from the language with which the opinion closes. That the decision rested upon the doctrine that there was a limit to the legislative power, appars from the fact that the dissenting opinion is based upon a denial of the soundness of such conclusion.* * * * * * * The stake driven by the decision in Norwood v. Baker is timely. Judicial expression on the subject was indefinite. There was a tendency to lose sight of the equitable basis which justifies the assessment upon private property of the cost of public improvements. The arbitrary act of the legislative body was often accepted as final without regard to its justice. It is to be hoped that the highest court of the land has spoken finally, and will not recede from its position."

The case of State v. Wheeler in the same court, 83 N. W. 108, presented an entirely different question and is no authority against the rule announced in Norwood v. Baker. In that case the board of public works, a board capable of being clothed with quasi-judicial powers, found that the rule that property abutting

on that part of the street which was to be paved, or specially benefited, at least to the extent of the entire cost, that such benefit was wholly confined to such abutting property, and that all of such property, that is each lot was uniformly and equally benefited per front foot; and on this finding the board of public works assessed the property by the front foot. The case is in principle clearly within the doctrine established in Norwood v. Baker.

The court in Heman v. Allen, Supra, places its decision upon the ground: first, that the case of Norwood v. Baker was *a street opening case;* second, that *the decision was by a divided court;* reasons which would seem entirely unsatisfactory.

In Hadley v. Dague, Supra, the court holds that assessments by the front foot rule must be held valid, notwithstanding the decision in the case of Norwood v. Baker, unless the record shows that there is substantial proof showing that the assessment was actually in substantial excess of the benefits. It recognizes the rule established in Norwood v. Baker, but holds that notwithstanding the assessment is contrary to the fourteenth amendment, nevertheless, it must be held valid, unless the property owner shall show that he is assessed in excess of the benefits to his property; a ruling which seems to us unsustainable on any principle of law un-

der the authorities, and directly in conflict with the ruling in Norwood v. Baker on this question.

In Conde v. City of Schenectady, the court, while disapproving of the rule established in Norwood v. Baker, decides the case upon other grounds, so that the decision in that case cannot be construed as a decision against the principles enunciated in the case of Norwood v. Baker.

Arbitrary Character of the Law:

The assessment in question proceeds upon a rule that is arbitrary and necessarily produces injustice and oppression.

No better illustration of this fact can be cited than the facts existing in the Norwood case and in the case of Ramsey County v. Lewis Co., Minnesota, recently decided, and such injustice is liable to be repeated in every case under the rule.

It is a matter of common knowledge that in cities of small size the principal streets extend from the business and densely populated centers through the outskirts to the limits of the city, and in the business portions of the city the lots are narrow, abutting upon the street on their narrowest dimensions, while in the outskirts they are liable to be platted fronting on the cross streets and abutting the longest dimension upon the street to be improved.

A lot 25 by 150 feet in the business portion of the city worth $10,000 might be benefited by the pavement $1,000; a lot of the same dimensions abutting upon the street by its longest side might be worth $500 and increased in valuation by the improvement $50. Assuming the cost of the pavement to be $5,— per front foot, the first lot would pay $125. for the improvement which would improve its value to the amount of $1,000; the lot in the sparcely settled portion of the city would pay $750 for the improvement, being largely in excess of the entire value of the property with the improvement. The result would be an absolute confiscation of the outer lot for the benefit of the inner one. This result is liable to happen in every instance in which the whole length of a street in a small city, or in a large one for that matter, is paved under this rule.

While this may be considered simply an inequality in the operation of the law, it is so grossly an injustice as to come within the definition of a denial of the equal protection of the laws and to bring it within the objection that it is deprivation of the property of a citizen without due process of law.

In Davidson v. New Orleans, Supra, Justice Bradley says: "I think, therefore, we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,'

provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' *but if found to be arbitrary, oppressive and unjust*, it may be declared to be not 'due process of law.'

Binding Force of State Decisions:

The decisions in the North Dakota cases is contrary to, and irreconcilably in conflict with the decision of this court in the case of Norwood v. Baker, *Supra*, and in cases of this character the rule of the state court will not be followed.

Whenever any department of the state government exercises a function not properly belonging to it, if its action affects private rights, the fourteenth amendment is violated and the state authority losses its force.

Gelpecke v. City of Dubuque, 1 Wallace, 176.

Kilbourne v. Thompson, 103 U. S. 190.

Necessity for Hearing:

The assessments levied under the statute in question and in consideration in this case *are an exercise of the power of assessments for local improvement and their constitutionality must be determined under the principles controling this power of assessment as distinguished from principles applicable only to general taxation.*

The right to be heard in cases of this character is a constitutional one and indefeasible. The law in question makes no provision for a hearing and gives to plaintiff in error no opportunity to be heard as to the justice of his assessment. It is therefore within the fourteenth amendment.

Stuart v. Palmer, 74 N. Y. 183.

Davidson v. New Orleans, *Supra.*

Walston v. Nevins, *Supra.*

Paulson v. Portland, *Supra.*

Hager v. Reclamation District, *Supra.*

Spencer v. Merchant, *Supra.*

Proof of Benefits:

The city proceeded upon the theory, justified by the words of the statute, that the *entire cost* incurred in the improvement could be put upon the abutting pro-

perty by front foot assessment irrespective of the special benefit. The assessment in controversy was by the front foot, and for a specific sum representing its proportional cost of the whole improvement, and that sum could not have been reduced under the statute even if proof had been made that the amount assessed exceeded the special benefit. The assessment was in itself an illegal one because it rests upon a basis that excluded any consideration of benefits. No proof was therefore necessary or proper to show that the assessment was not in excess of benefits. The only appropriate decree was one enjoining proceedings under the law.

Norwood v. Baker, Supra, 291.

Tender:

The case is one in which the entire assessment is illegal and in violaton of the provisions of the fourteenth amendment. The plaintiff in error was therefore entitled, without making any tender of any portion of the assessment, to ask the court to enjoin the enforcement of the rule of assessment that infringed upon his constitutional rights.

Norwood v. Baker, Supra, 293.

We are profoundly conscious of the gravity of the power we are asking this court to exercise, the power to arrest the proceedings of a sovereign state, which we believe to be in violation of the protection of our property rights which the Constitution of the United States guarantees.

We are equally conscious that the burden is upon us to show to the court that we are entitled to that protection. This we believe we have done.

We ask that the judgment of the state court be revised.

SETH NEWMAN,
BURLEIGH F. SPALDING,
Counsel for Plaintiff in Error.